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Erin Morrow Hawley

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Symposium:

A Future Without the Administrative State?

Exploring the Administrative State

*Erin Morrow Hawley**

The administrative state today “wields vast power and touches almost every aspect of daily life.”¹ There’s no question that the Founders would have been surprised by the current administrative state.² By and large, however, both the academy and Article III judges are either reluctant or enthusiastic devotees of the administrative state. A variety of arguments have been put forward to situate the Fourth Branch within the constitutional fabric, from constitutional moments,³ to the Supreme Court’s pragmatic recognition that, given government as we know it, “Congress simply cannot do its job absent an ability to delegate power under broad general directives.”⁴ As Jeff Pojanowski puts it in this Symposium, “Th[e] administrative state is here, and, absent radical and unlikely changes in the scope of federal power, it is not going away.”⁵

* Associate Professor of Law, University of Missouri School of Law.

1. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010).

2. *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting) (as one Supreme Court Justice put it, the administrative state, “with its reams of regulations[,] would leave [the Framers] rubbing their eyes”).

3. See generally Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989); Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984). But see PHILLIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014); Gary Lawson, *The Rise and Rise of the Administrative Estate*, 107 HARV. L. REV. 1231 (1994).

4. *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

5. Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1075 (2016).

Yet a number of Supreme Court Justices have expressed concerns about the “danger posed by the growing power of the administrative state.”⁶ As a result, the Court has been increasingly open to structural challenges to the administrative state in the last few terms.⁷ In particular, the Court has focused on the level of deference due administrative regulations.⁸ It has resurrected the major questions doctrine,⁹ recommended overturning the *Auer* doctrine,¹⁰ and individual Justices have even questioned the constitutionality of *Chevron* deference.¹¹

It is time to consider the administrative state afresh given the Supreme Court’s renewed interest in challenges to the status quo. In this vein, the *Missouri Law Review* Symposium seeks to advance the academic discussion by looking closely at questions regarding the contours of the administrative state and, in particular, examining reasonable alternatives to *Chevron* deference.

Professor Hamburger begins by further developing his claim that modern administrative law is unconstitutional and addresses concerns raised by scholars in response to his book *Is Administrative Law Unlawful?*¹² Professor Hamburger first counters arguments that the royal prerogative power was unlimited.¹³ He argues instead that such power was at times bound by statute, and that in all events, the extralegal (meaning power exercised by administrators outside of the law) nature of the prerogative power remained problematic and was addressed by English constitutional ideals, providing a basis for

6. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting).

7. *See, e.g.*, *Dep’t of Transp. v. Ass’n of Am. R.R.s*, 135 S. Ct. 1225 (2015); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013); *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). *See also* Kent Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 MO. L. REV. 1023, 1023–24 (2016) (“[T]he Supreme Court of the United States and individual Justices have welcomed structural challenges to the administrative state and Article I courts.”).

8. *See, e.g.*, *Michigan v. EPA*, 135 S. Ct. 2699 (2015); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199 (2015); *Decker*, 133 S. Ct. at 1338; *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

9. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (determining “whether [tax credits] are available on Federal Exchanges is a question of deep ‘economic and political significance’ . . . [and] had Congress wished to assign that question to an agency, it surely would have done so expressly”); *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (“We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”).

10. *Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring); *Decker*, 133 S. Ct. at 1339–40 (Scalia, J., concurring in part and dissenting in part).

11. *Michigan*, 135 S. Ct. at 2713 (Thomas, J., concurring).

12. Philip Hamburger, *Early Prerogative and Administrative Power: A Response to Paul Craig*, 81 MO. L. REV. 939, 939 (2016).

13. *Id.* at 942.

American constitutional concerns over extralegal power.¹⁴ Professor Hamburger also responds to the claim that the existence of local and non-royal extralegal “administrative” power in seventeenth- and eighteenth-century England establishes that the English constitution did not in fact develop to limit extralegal administrative power.¹⁵ Professor Paul Craig, for example, argues that such power was approved of by Parliament and by English courts and that this legitimate power, and not the prerogative power, was the antecedent of contemporary American administrative law.¹⁶ Professor Hamburger responds that English constitutional ideals condemned the prerogative power and were deployed mostly against centralized prerogative power.¹⁷ In the U.S. Constitution, however, the Founders barred almost all extralegal power.¹⁸ In sum, Professor Hamburger argues that early Americans drafted their own constitutions, and, in particular, the U.S. Constitution, which condemn the use of extralegal administrative authority by looking to the English constitutional response to extralegal edicts.¹⁹

Professor Jonathan Adler argues that, while *Chevron* deference may be here to stay, it should be “confined to its proper domain.”²⁰ The underlying rationale for deference, he argues, should determine *Chevron*’s “scope and application.”²¹ Thus, since *Chevron* is “predicated on a theory of delegation,” *Chevron* deference should only be available when Congress has in fact delegated interpretive authority.²²

Professor Joseph Postell sees the growing administrative state as a threat to republican government. He claims that the nondelegation theory has been unpersuasive because that theory is based upon wrong constitutional assumptions.²³ He argues that, while the doctrine “is typically linked to the theory of the separation of powers, the true foundation . . . is the idea of the social compact and the related theory of republican government.”²⁴ According to Postell, the transfer of legislative power to administrative agencies is problematic because it is outside the chain of accountability – the people do not elect agency officials either directly or indirectly.²⁵

14. *Id.* at 942–51.

15. *Id.* at 951–69.

16. *Id.* at 951.

17. *Id.*

18. *Id.* at 956–58.

19. *Id.*

20. Jonathan H. Adler, *Restoring Chevron’s Domain*, 81 MO. L. REV. 983, 985 (2016).

21. *Id.*

22. *Id.*

23. Joseph Postell, “*The People Surrender Nothing*”: *Social Compact Theory, Republicanism, and the Modern Administrative State*, 81 MO. L. REV. 1003, 1003, 1008 (2016).

24. *Id.* at 1003.

25. *Id.*

Professor Kent Barnett contends that challenges to administrative judges and their appearance of partiality “are well positioned to be part of the new wave of structural challenges to the administrative state.”²⁶ He believes that challenges to administrative judging may fare well for several reasons. First, to require nonpartiality from administrative law judges would not require the Court to overrule any of its decisions, and indeed, such a requirement is consistent with recent case law.²⁷ Second, a challenge to the partiality of administrative judging fits within the Court’s recent affinity for formalist results.²⁸ Finally, as a practical matter, there may be enough votes on the Supreme Court for partiality challenges to succeed.²⁹ Professor Barnett concludes by arguing that, since “finding partiality within the administrative state would likely have significant, widespread disruptive effects, the President, agencies, and Congress should rethink administrative adjudication before courts make them do so.”³⁰

Professor Andy Grewal argues that the Supreme Court’s shifting attitude towards administrative deference should not affect its deference to the IRS’s interpretation of the income tax code.³¹ Professor Grewal posits that courts should defer to the IRS, rather than apply the rule of lenity, in dual application (civil and criminal) statutes, “because the rule of lenity has no place in the construction of the income tax provisions.”³² This is because such statutes do not compel or prohibit behavior; they “simply describe consequences associated with particular transactions.”³³

Professor Aditya Bamzai takes us on a historical journey to recover the true meaning of *Marbury v. Madison*’s famous statement that “it is emphatically the province and duty of the [judiciary] to say what the law is.”³⁴ He argues that recent decisions limiting deference to agencies based on *Marbury* have ignored the statutory analysis in that case.³⁵ On a closer read, the *Marbury* Court considered three types of “deference,” “through its (1) treatment of executive custom in statutory interpretation, (2) discussion of the ‘political question’ doctrine, and (3) use of the ministerial/executive distinction under the writ of mandamus.”³⁶ Professor Bamzai argues that since these doctrines together gave rise to modern deference to executive interpretation, under-

26. Barnett, *supra* note 7, at 1025.

27. *Id.* at 1026.

28. *Id.*

29. *Id.*

30. *Id.*

31. Andy S. Grewal, *Why Lenity Has No Place in the Income Tax Laws*, 81 MO. L. REV. 1045, 1046 (2016).

32. *Id.*

33. *Id.*

34. Aditya Bamzai, *Marbury v. Madison and the Concept of Judicial Deference*, 81 MO. L. REV. 1057, 1057 (2016) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

35. *Id.* at 1062.

36. *Id.*

standing their application in *Marbury* gives us a better understanding of the rise of judicial deference.³⁷ It also provides a mode of critique.³⁸

Professor Jeffrey Pojanowski imagines a world without *Chevron* where courts review agency conclusions on questions of law *de novo*.³⁹ He argues that, while this alternative has some appeal, it is unlikely to bring as much change as the *Chevron* critics believe.⁴⁰ Indeed, the largest “change would come from how we *think* about law and policy in the administrative state.”⁴¹ Instead of the moderate legal realism underlying *Chevron*, non-deferential review rests on a far more classical understanding.⁴² Professor Pojanowski argues that this classical understanding sheds light “on the rise and (partial) fall of *Chevron* in administrative legal thought.”⁴³

Professor Christopher Walker maintains that, with the passing of Justice Scalia, the Supreme Court is unlikely to toss *Chevron* (or even *Auer*) deference to the curb, but it might well embrace a different narrowing mechanism: a context-specific *Chevron* doctrine.⁴⁴ Professor Walker explains that the Chief Justice’s invocation of the major questions doctrine in *King v. Burwell* at the Step Zero stage is a novel use of that doctrine.⁴⁵ In particular, he argues that the Chief Justice’s decision to avoid entirely the *Chevron* framework is an outworking of his earlier dissent in *City of Arlington*.⁴⁶ In that case, the Chief Justice argued that Congress must have delegated to an agency on a specific issue in order for the Court to assume that Congress intended the courts to defer to agency interpretations.⁴⁷ Counting votes, Professor Walker argues that the academy should pay attention to the Chief Justice’s *Chevron*-limiting approach, as it may well become the law of the land.⁴⁸ Further, Professor Walker explains how recent empirical studies of congressional drafters and agency rule drafters provide support for a context-specific *Chevron* doctrine.⁴⁹

Professor Emily Bremer considers a novel alternative to a reduced or even eliminated administrative state: private governance.⁵⁰ Her article challenges the assumption that there are only two options: “governmental regula-

37. *Id.*

38. *Id.*

39. Pojanowski, *supra* note 5.

40. *Id.* at 1078.

41. *Id.*

42. *Id.*

43. *Id.*

44. Christopher J. Walker, *Toward a Context-Specific Chevron Deference*, 81 MO. L. REV. 1095, 1097 (2016).

45. *See id.* at 1103, 1107.

46. *Id.* at 1105–06.

47. *Id.* at 1105.

48. *Id.* at 1099, 1106.

49. *Id.* at 1107.

50. Emily S. Bremer, *Private Complements to Public Governance*, 81 MO. L. REV. 1115, 1115 (2016).

tion or no regulation at all.”⁵¹ She argues that private governance – meaning nongovernmental action in the pursuit of traditional government goals – may complement and in some instances replace the administrative state.⁵² She offers a number of current examples and suggests that comparative institutional analysis can help identify situations where private governance “may be an effective and attractive alternative to governmental regulation.”⁵³

51. *Id.*

52. *Id.* at 1119–20.

53. *Id.* at 1120.